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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

## No. 535.

ELLEN EMERSON, *Petitioner,*

vs.

HOLLOWAY CONCRETE PRODUCTS COMPANY, INC.

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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### INTRODUCTORY NOTE CONCERNING ABBREVIATIONS.

Hereinafter the following abbreviations are used:

P—Petition for Writ of Certiorari

A—Appendix to Petition

RAp—Appendix to this Brief in opposition

ABR—Appellant's Brief before Circuit Court of Appeals

R—Record on Appeal before Circuit Court of Appeals

## QUESTIONS PRESENTED.

Petitioner sets forth three questions, the first of which asks whether or not a Circuit Court of Appeals, on review of a wrongful death case, may properly fail to inquire as to whether or not the State Statute incorporated the Maritime Law and Rules as to the scope and measure of liability. The second question presented seeks to have this Court re-construe a Statute of the State of Florida; while the third seeks to have this Court reverse its decision in *The Tungus* v. *Skorgaard*, 358 U.S. 588.

## STATEMENT OF THE CASE.

Beginning on Page 2 of the Petition, Petitioner cites certain of the facts of the case as set forth by the opinion of the Circuit Court of Appeals. While we do not agree *in toto* with the statement, it sets forth sufficiently the findings of the Circuit Court of Appeals as not to require further comment at this time. We would like to point out, however, that the facts as there stated differ somewhat from the "Findings of Fact and Conclusions of Law" of the District Judge. (R-195)

The owner of the boat, HOLLOWAY CONCRETE PRODUCTS COMPANY, INC., brought a Petition to limit its liability or for exoneration in the District Court. Among the several claims filed was that of Ellen Emerson, Widow of Francis Emerson, deceased. At the conclusion of certain testimony, the District Court rendered certain findings of fact and conclusions of law (R-195) and found that by reason of such findings of fact, Petitioner below, *Holloway Concrete Products Company, Inc.;* was not entitled to exoneration or to limitation of liability. These findings have not, as yet, been reviewed on appeal.

The lower court further found, however, that the death of Francis Emerson was not actionable under the facts in the case and pursuant to the applicable Florida Law, and therefore that Ellen Emerson was not entitled to recover. (R-199)

While the remaining proceedings were still pending in the District Court, Ellen Emerson took her appeal from the lower court's determination that she was not entitled to recover. The Circuit Court of Appeals sustained the lower court, since the sole question presented was essentially one of the interpretation of a Florida Statute. Thereafter, this Petition was filed here.

The position which the Petitioner took before the Circuit Court of Appeals is significant. There she relied on four Specifications of Errors. (ABR-7, 8) We have set these forth in full in our Appendix. (RAp-A1) In her Brief below, Petitioner summed up the question involved as follows:

> "When a boat owner (through his servant or agent) invited another to come aboard a boat on navigable waters of Florida, and after coming aboard, the person invited was killed, because of an explosion and fire occurring on the boat while he was assisting in the starting of the boat's engine, at the request of the owner, did the boat owner owe a duty of ordinary and reasonable care toward the deceased at the time of the explosion and fire?" (ABR-8; RAp-A2)

In her Brief, under her "*Argument*", Petitioner began as follows:

> "A. *Introductory.*
>
> Because of the fact that this claimant's claim arises by virtue of the Florida Death by Wrongful Act Statute, Section 768.01, Florida Statutes, and is simply

> sought to be enforced in a Court of Admiralty, the substantive rights of the parties are to be determined by the law of Florida. *Graham* v. *A. Lusi, Limited*, (5 Cir.) 206 F.2d 223; *The Tungus* v. *Skovgaard*, U.S. , 3 L.Ed. 2d 524." (ABR-8; RAp-A2)

These were the issues presented before the Court as appears affirmatively from the decision herein sought to be reviewed. The Circuit Court says:

> "On Appeal it is urged that the question whether there is liability of Holloway to Mrs. Emerson is to be determined by the law of Florida; that Emerson was an Invitee upon the boat but whether he was an invitee or licensee, Holloway owed him a duty of reasonable care; that this duty was breached; that Emerson's death resulted from the negligence of Holloway's agent and employee; and that recovery should not be denied to Mrs. Emerson. The District Court denied the Petition of Holloway for Limitation of Liability. No Appeal is before us with respect to this ruling." (A-3, 4)

Subsequently, and following final judgments in behalf of the other claimants in the District Court, *Holloway* appealed, asigning as error the findings of fact and conclusions of law of the District Court and attacking the denial of its right to limit liability. This case is still pending before the Circuit Court of Appeals, Fifth Circuit, and is Appeal No. 18,414. Thus, the correctness of the findings of fact and of the action of the lower court in denying *Holloway* the right to limit, have not, as yet, been reviewed on appeal. Petitioner's local counsel are counsel of record for some of the other parties in the said appeal.

Petitioner did not attack the propriety of this Court's holding in *The Tungus* (*supra*) below, as she is doing here. On the contrary, as indicated above, *The Tungus* was one

of the cases on which she relied before the Circuit Court of Appeals.

So far as we can determine from a careful reading of the Petition, the real issue which Petitioner would have this Court consider is whether or not the Fifth Circuit Court of Appeals and the United States District Court correctly construed the Florida Statute; and would seek to persuade this Court to make its own construction of the said State Statute, setting aside and nullifying the constructions placed thereon by the two lower Federal Courts.

## REASONS FOR DENYING THE WRIT.

Paragraph 1 (b), Rule 19, sets forth the considerations governing review on Certiorari. None of the considerations set forth in Rule 19 appear at all in this Petition; nor does it appear that "there are special and important reasons therefor."

Beginning on Page 6 of the Petition, Petitioner sets forth her arguments. The introductory portion of this is a brute appeal to sympathy and bias and contains statements which, if they should ultimately prove to be true, are not, as yet, true. We refer to the statement:

> "The boatyard owner has been made whole for his loss."

While it is true that the boatyard owner has secured a *judgment* for his loss, this judgment is now standing on appeal and we, ourselves, feel that the judgment is going to be reversed; but in any event, the boatyard owner has not yet "been made whole for his loss". Petitioner continues with the statement that had Francis Emerson lived, he, too, would have recovered damages for his injuries.

As to whether or not Francis Emerson would have been able to recover on the facts shown, is still very far from clear. Accepting as correct and accurate (which we do not) the Findings of Fact, it is clear that, at least under Florida Law, prior to the decision of this Court in *Kermarec* v. *Compagnie Generale*, 358 U.S. 625, Emerson, being a social guest on the boat, would not have been entitled to recover. (See *Pensacola, St. Andrews & Gulf S.S. Co.* v. *Austin*, 62 Fla. 241, 58 So. 611). It was only in *Kermarec* that this Court abolished the distinction between classes of guests on board vessels.

This Court decided the case of *Kermarec, supra*, on February 24, 1959. The Findings of Fact by the District Court were filed in this case on January 23, 1959, and this Court's supplementary order ruling against Mrs. Emerson, was filed February 25, 1959.

Prior to this Court's decision in *Kermarec*, Admiralty Law recognized the distinctions between licensees and invitees which the common law recognize, and which the Common Law of Florida still recognizes. In any event, to apply the *Kermarec* rule, the District Court would have needed prophetic foresight.

Certainly, the Legislature of the State of Florida, which passed the Florida Wrongful Death Statute (768.01) in its present form in 1915, could hardly be said to have incorporated in that Statute the rule set forth in *Kermarec*.

Other improper expressions are included in this paragraph (such as a statement that Mr. Emerson died "after untold agony", etc.) which are wholly unsupported by the record. Petitioner speaks of the result obtained below as "obviously unjust". Whether the result is just or unjust depends upon the point of view; but in any event, it is one which could be readily rectified by Congress. If

Congress has never seen fit to pass a Wrongful Death Statute for the benefit of persons situated like Mrs. Emerson, it is not the function of this Court to supply any such lacuna. Emotional appeals should be directed to the Legislature and not this Court.

Turning to the grounds specifically set forth (P-7) Petitioner gives as her first reason for granting the Writ a statement that

> "The first inquiry must be whether such Statute adopts or rejects the standards of liability laid down by the general Maritime law."

Petitioner then urges that the lower court erred in failing to consider whether Florida did, in fact, adopt the standards of Maritime law. However, turning to the opinion, the Circuit Court says:

> "The problem here is to determine what law the Courts of Florida would apply to the facts in this case if the case were presented in the courts of that state as an action for wrongful death." (A-6)

It then discusses a number of Florida decisions, and the contention of Appellant-Petitioner and finds that Florida did not intend to adopt the "active" and "passive" theories of negligence—which is simply another way of stating that Florida did not intend to incorporate the general Maritime Law into this Statute.

Petitioner next asks whether or not Florida did, in fact, incorporate such standards. The Circuit Court considered the point and found that Florida did not. In raising this point, Petitioner attempts to persuade this Court to place its own construction upon the said Florida Statute. But it is well established that where lower Federal Courts are applying local law, this Court will not set aside their rulings except on a plain showing of error. *Palmer* v.

*Hoffman*, N.Y. 1943, 63 S. Ct. 477, 318 U.S. 109, 87 Lawyer's Ed. 645, 144 A.L.R. 719.

The third reason given by Petitioner (P. 10) is to urge that where the state law would give a broader liability than that expressed by common law, the Federal Court will apply the state statute to afford broader liability. We fail to see how this has any application here, since there is no showing that the State of Florida would give its Statute any broader application than the District Court and the Circuit Court of Appeals had given here.

Petitioner concludes by asking this Court to reverse its decision in *The Tungus*, above. We do not feel that justice, equity and the necessity of a reasonable degree of stability in the law, justify this Court in now reconsidering that well considered opinion which was nothing but a re-expression of long established principles. Furthermore, Petitioner, having relied upon and followed *The Tungus* below cannot be heard to complain here.

There is a further reason why this Court should deny the present Petition. As indicated, the only question before the Court of Appeals, was the correctness of the rule of law followed by the District Court. No Cross-Assignments of Error were served in that case, since Respondent was aware that it would be necessary to have the lower court's erroneous Findings of Facts and Conclusions of Law reviewed on appeal after Final Judgment. Such Appeal has now been perfected and is now pending. Even if this Petition were granted, it is altogether possible that, meanwhile, the Circuit Court of Appeals may have reversed the District Court's denial of the Petition to Limit Liability and the end result would still be no recovery for the Petitioner. To ask this Court to perform what, in all likelihood, will end up being an utterly futile act, appears

to us to be an imposition upon the dignity and importance of this, the Supreme Court of our land.

For the foregoing reasons, the Petition should be denied instanter.

Respectfully Submitted this the day of December, 1960.

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